STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 9, 2003
v	No. 241753 Ionia Circuit Court
BRADLEY SCOTT LASCO, Defendant-Appellant.	LC No. 01-012066-FH

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of resisting and obstructing arrest, MCL 750.479. Defendant was sentenced to two concurrent ten-month jail terms[1] and ordered to pay various fines. He appeals as of right. We affirm.

Defendant first presents several claims of ineffective assistance of counsel. Such claims present a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error and questions of law are reviewed de novo. *Id*. Our review is limited to facts on the record, unless the defendant makes a motion for new trial or evidentiary hearing. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999). In this case, defendant did file a motion for new trial; however, it was not based on a claim of ineffective assistance of counsel. Nevertheless, we consider the record to the extent that the subsequent hearing sheds light on defendant's ineffective assistance of counsel claims.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[1] Because defendant was out on bond when the instant offenses were committed, the trial court ordered defendant to serve the instant sentences consecutive to the remainder of his sentences in two previous cases.

Defendant first contends that defense counsel was ineffective by failing to challenge the validity of the arrest warrant because resisting an invalid arrest warrant would have been a complete defense. *People v Landrie*, 124 Mich App 480, 482; 335 NW2d 11 (1983), overruled in part on other grounds *People v Wells*, 138 Mich App 450 (1984). We find no merit in defendant's argument. MCL 750.479 prohibits a suspect from resisting arrest pursuant to a lawful warrant. But defendant presents no evidence to indicate that the arrest warrant was not valid, nor does he even offer a basis on which to challenge the arrest warrant. And, at trial, defense counsel conceded its validity. Based on these facts, defendant has failed to overcome the strong presumption that defense counsel rendered effective assistance and that his conduct constituted sound trial strategy. *LeBlanc, supra* at 578.

For the same reason, defendant's next claim of ineffective assistance of counsel fails. During closing argument, defense counsel argued that the witnesses' conflicting accounts of defendant's arrest did not mean that one of the witnesses was lying, but rather all could have testified truthfully, the difference being in how each person perceived the events which governed the person's subsequent actions and reactions. By doing so, defense counsel attempted to create reasonable doubt regarding whether defendant actually resisted arrest. We find no reason to believe that defense counsel's tactic did not constitute sound trial strategy. Simply because a trial strategy proves unsuccessful does not render counsel's performance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant also argues that defense counsel was ineffective because he did not object to the prosecutor's use of prior bad acts evidence without giving the notice required by MRE 404(b)(2). However, if a defendant raises an issue, the prosecution is entitled to develop it further. See *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Here, the prosecution asked a witness on cross-examination about defendant's prior arrest only after defense counsel made the initial inquiry. Defense counsel was apparently attempting to show that defendant's prior dealings with the arresting officers colored the officers' actions toward defendant. This Court has held that "[a] defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Therefore, defense counsel could not have successfully objected to the prosecutor's questions. Counsel is not ineffective for failing to make a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that the prosecutor committed misconduct when the prosecutor baited him during a bantering exchange that prompted the prosecutor to make a disparaging remark to defendant, which allegedly made the judge laugh. Defendant asserts that this conduct prejudiced his right to a fair and impartial trial because the judge's reaction gave the jury the impression that he approved of the prosecutor's comment.

We review claims of prosecutorial misconduct on a case-by-case basis, examining the comments in context, to determine whether the defendant was denied a fair and impartial trial. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). While attempting to ascertain how the police officers could have fallen down if defendant was not struggling, the following exchange occurred between the prosecutor and defendant:

Q. [I]f they have got this door open and they both got their hands on you, just like this, they charge you right[?] [I]f you're not struggling with them, if you're not resisting, how does anybody go anywhere? They already have their hands on you, Brad. They've got you. So if you're not pulling, how are you falling backwards?

A. Charge me, sir, and you will find out.

Q. Well, I don't want to get assaulted like you did these officers.

While the prosecutor's last comment was inappropriate, any damage could have been corrected at trial had defendant objected. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Leshaj*, *supra* at 419.

Defendant also asserts that defense counsel's failure to object to the prosecutor's comment constituted ineffective assistance of counsel. Defense counsel did not object at the time because, based on the judge's facial expression indicating amusement, he believed that a cautionary instruction would do more harm than good. Instead, defense counsel chose to highlight the error in a motion for new trial, which was denied. Defense counsel's decision not to object was clearly one of trial strategy and we will not assess counsel's performance with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Even had defense counsel objected, we do not believe that it is more probable than not that the prosecutor's comment or the judge's alleged reaction was outcome determinative. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). Accordingly, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello